SENTENCING – Rule 26.4 – Presentence report – Revised 3/2010

After a defendant has been found guilty, the matter is set for sentencing under Rule 26.3, Ariz. R. Crim. P. When the possible sentence is one year or more and the sentencing judge has discretion in determining what penalty to impose, the defendant is entitled to have a presentence report prepared under Rule 26.4, unless a presentence report on the defendant is already available. That Rule provides:

> Rule 26.4. Pre-sentence report
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> a. When Prepared. The court shall require a pre-sentence report in all cases in which it has discretion over the penalty to be imposed, except that requiring such a report is discretionary in those cases in which the defendant can only be sentenced to imprisonment for less than one year, in which a request under Rule 26.3(a) is granted, or in which a pre-sentence report concerning the defendant is already available. A pre-sentence report shall not be prepared until after the determination of guilt has been made or the defendant has entered a plea of guilty or no contest.
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> b. When Due. Except when a request under Rule 26.3(a) has been granted, the pre-sentence report shall be delivered to the sentencing judge at least 2 days before the date set for sentencing.

The Comment to Rule 26.4 explains that previous presentence reports may be available in cases that have been remanded for resentencing, but cautions: "When the attorneys bring to the attention of the court, or the court itself finds indications, that there have been significant changes in the defendant or his environment since the last report was prepared, a new pre-sentence report should be ordered." The Comment also states that the trial court may order a presentence report even when none is required under the Rule. *See also* A.R.S. § 12-253(4) (setting out the powers and duties of the adult probation officer in investigating cases and preparing presentence reports).

In cases in which the trial court has discretion in imposing sentence, the Arizona courts have long held that a court must tailor the sentence to fit the particular defendant, based on complete and accurate information. *State v. Watton*, 164 Ariz. 323, 327, 793 P.2d 80, 84 (1990). "The primary source of information at sentencing usually is the presentence report, which contains a broad range of information about a defendant and serves a key function in the sentencing process." *Id.*; *see also State v. Grier*, 146 Ariz. 511, 515, 707 P.2d 309, 313 (1985)*; State v. Clabourne*, 142 Ariz. 335, 346, 690 P.2d 54, 65 (1984); *State v. Fenton*, 86 Ariz. 111, 119, 341 P.2d 237, 242 (1959); *State v. Gayman*, 127 Ariz. 600, 602, 623 P.2d 30, 32 (App.1981).

The sentencing judge has discretion to determine the weight to give the presentence report. *State v. Watton*, 164 Ariz. at 327, 795 P.2d at 84. Trial courts are presumed to be able to focus on relevant sentencing factors and set aside the "irrelevant, the inflammatory, and the emotional factors." *State v. Gonzales*, 181 Ariz. 502, 516, 892 P.2d 838, 852 (1995) (internal citations omitted). "Whenever a trial court explicitly states that it is taking a presentence report or victim impact statement into consideration, it should point out what portions are being considered and which, if any, are being ignored." *State v. Bocharski*, 200 Ariz. 50, 56, 22 P.3d 43, 63 (2001). In addition, the defendant has the right to challenge the information in the presentence report. *State v. Watton*, 164 Ariz. at 327-28, 793 P.2d at 84-85.

The information in the presentence report may include reliable hearsay, provided that the defendant has an opportunity to challenge that information. *State v. Hunt*, 13 Ariz. App. 267, 270, 475 P.2d 752, 755 (App. 1970). "Responsible unsworn or out-of-court information relative to the circumstances of the crime and to the convicted

person's life and characteristics may be considered by the sentencing judge." *State v. O'Donnal*, 110 Ariz. 552, 555, 521 P.2d 984, 987 (1974). Information in presentence reports taken from police records is generally admissible. *State v. Marquez*, 127 Ariz. 3, 6, 617 P.2d 787, 790 (App. 1980). "Whether information in the pre-sentence report is reliable is largely within the discretion of the trial court and is generally admissible." *State v. Moreno*, 153 Ariz. 67, 70, 734 P.2d 609, 612 (App. 1986).

The presentence report may also contain information concerning organizations to which the defendant belongs if that information is relevant to the sentencing decision. *State v. Wilson*, 179 Ariz. 17, 21, 875 P.2d 1322, 1326 (App. 1993). In *Wilson*, the defendant was convicted of burglary and the presentence report mentioned the defendant's prior prison term. The report contained aggravating information about the defendant, including his membership in the Aryan Brotherhood (AB), a white-racist prison gang. The presentence report stated that the defendant 's prior adjustment to prison had been extremely poor due to his AB affiliation and noted that he would need maximum security monitoring to avoid future gang activities. The defendant sought post-conviction review, arguing that the trial court improperly considered his AB membership against him in violation of *Dawson v. Delaware*, 503 U.S. 159, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992). The Court of Appeals disagreed, noting that the AB information in the presentence report "was relevant to the trial court's inquiry into defendant's prison record and his potential for violence, unlawful activity, or rehabilitation." *Wilson*, 179 Ariz. at 21, 875 P.2d at 1326.

Because the pre-sentence report is an integral part of the sentencing process, probation officers are entitled to absolute immunity in preparing and submitting

presentence reports to the court. *Acevedo by Acevedo v. Pima County Adult Probation Dept.*, 142 Ariz. 319, 322, 690 P.2d 38, 41 (1984). And because the trial court relies on the presentence report in exercising its sentencing discretion, it is vital that the information in the presentence report be complete and accurate. *See State v. Watton*, 164 Ariz. at 327, 793 P.2d at 84. Nevertheless, the "goal of providing the court with complete and accurate information at sentencing does not mean that a defendant is entitled to a presentence report of his own liking. The mere fact that a presentence report contains information adverse to defendant does not render the report biased or inaccurate." *Id*., citing *State v. Stanhope*, 139 Ariz. 88, 94, 676 P.2d 1146, 1152 (App.1984).

Although a defendant has a right to a presentence report, he may choose to waive that right in whole or in part, and the court cannot force him to speak to the probation officer assigned to prepare a presentence report. "A defendant has a constitutional right not to speak with a probation officer for sentencing purposes" and may entirely waive his right to have a presentence report prepared under Rules 26.3(a) and 26.4(a). *State v. Cornell*, 179 Ariz. 314, 333, 878 P.2d 1352, 1371 (1994), *citing State v. Kerekes*, 138 Ariz. 235, 237, 673 P.2d 979, 981 (App. 1983).

In *Cornell*, the defendant killed his estranged girlfriend, wounded her father, and pointed his gun at several other people while making his escape. The defendant represented himself at trial and was convicted of first degree murder and other charges. After the jury verdicts were read, the defendant declared, "Your Honor, I'd like the record to reflect I do not wish to meet with my presentence reporter." 179 Ariz. at 333, 878 P.2d at 1371. Accordingly, the adult probation officer assigned the case made no

effort to meet with or interview the defendant, and prepared a presentence report recommending the death penalty. The trial court imposed the death penalty. On appeal, the defendant argued that "the court should have realized that anyone might make intemperate comments after a capital conviction and therefore should have ordered the probation officer to try to speak with Defendant, after he had time to cool down, to see if there was some basis for leniency." *Id*. at 333, 878 P.2d at 1371. He argued that because the trial court did not order the probation officer to attempt to speak with him, the court violated Rule 26.4. The Arizona Supreme Court rejected this argument, reasoning that the defendant explicitly invoked his right not to speak with the probation officer and never retracted it, even though he later filed several *pro per* motions with the court. Further, the trial judge knew a great deal about the defendant because he had presided over the trial. In addition, the defendant's advisory counsel argued on his behalf in the sentencing hearing, giving the judge additional information favorable to the defendant. The court also reasoned that the defendant had shown no prejudice because nothing indicated that anything the defendant could have said would have convinced the probation officer to write a "glowing presentence report." *Id*. at 333, 878 P.2d at 1371. The Court concluded, "Defendant expressly declared in open court that he was unwilling to meet with the probation officer, and never withdrew that declaration. This might have been a mistake on his part, but the court's compliance with his wish was not error." *Id*. at 333-34, 878 P.2d at 1371-72.